Supreme Court, U.S.
FILED
SEP 30 1980
MICHAEL RODAK, JR., CLERK

NO. 80-618

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

REFRIGERATED TRANSPORT CO., INC., FARWEST FURNITURE TRANSPORT, INC., THE KANSAS-ARIZONA MOTOR EXPRESS, INC., and WILLERS, INC., d/b/a WILLERS TRUCK SERVICE,

Petitioners,

v.

THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OF COUNSEL:

SERBY & MITCHELL, PC
3390 Peachtree Rd, NE
Suite 520
Atlanta, Georgia
30326
(404) 262-7855

ALAN E. SERBY

LEE S. GOLDSTEIN

Attorneys for
Petitioners

QUESTIONS PRESENTED

Each of the following questions presented relates exclusively to the regulation adopted by the Commission modifying 49 C.F.R. §1057. 12(1)(5):

(1) Whether the Court Below erred by validating the Interstate Commerce Commission's unfounded extension of its authority over leasing through its derivation of one implied power from another implied power?

(2) Whether Petitioners were afforded adequate notice or time to submit evidence as to the imposition of an interest rate at least equal to Treasury Bills?

(3) Whether the Commission's adoption of the specified rate of interest in the subject regulation was arbitrary, capricious and without a rational basis?

(4) Whether the Commission's willful failure to allow Petitioners to submit any evidence as to the changed rates of interest in the final regulation constituted an unconstitutional confiscation of the property of Petitioners?

I N D E X

	Page
Opinions Below	iv
Jurisdiction	iv
Questions Presented	1
Statutes Involved	2
Statement	3
Reasons for Granting Writ	4
Conclusion	15
Appendix A-Opinion of Court Below	16
Appendix B-Involved Commission Orders Modifying 49 C.F.R. § 1057.12(1)(5) . .	
(1) Final Order	33
(2) Proposed Order	34
Appendix C-Statutes Involved	35

AUTHORITIES

Cases:	Page:
American Trucking Associations v. U.S., 344 U.S. 298 (1953)	6,9
Braswell Motor Freight, Inc. v. U.S., 287 F. Supp. 215 (1968)	11
Dell v. Summerfield, 198 F. Supp. 843 (1961)	11
Eastern-Central Motor Carriers Assn. v. U.S., 239 F. Supp. 591 (1965)	7
Ex-Parte No. MC-43 (Sub-No. 7), Lease and Interchange of Vehicles, 131 M.C.C. 141 (1979)	3
Ex-Parte No. MC-92, Investigation of Impact of Rising Fuel Costs, 346 I.C.C. 712 (1974)	14
Greyhound Corp. v. U.S., 221 F. Supp. 440 (1953)	5
McLean Trucking Co. v. U.S., 321 U.S. 67	7
Mitchell Bros. Truck Lines v. U.S., 225 F. Supp. 755 (1963)	11
National Citizens Committee for Broadcasting v. FCC, 555 F. 2d 938 (1977)	13
Northeast Airlines, Inc. v. C.A.B., (C.A.-Mass. 1964), 331 F. 2d 579	11

Refrigerated Transport Co., Inc. v. U.S., 390 F. Supp. 845 (1975) 14

Reid v. Memphis Publishing Company, 521 F. 2d 512 (1979) 8

Schaffer Transp. Co. v. U.S., 355 U.S. 83 (1957) 11

Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80 (1943) 12

U.S. v. Resler, 313 U.S. 57 (1941) 5

Statutes:

5 U.S.C. §553 2
5 U.S.C. §706(2)(A) 13
28 U.S.C. §1254(1) iv
28 U.S.C. §1651 iv
28 U.S.C. §2106 iv
49 U.S.C. §10707(d) 9
49 U.S.C. §11101 6
49 U.S.C. §11107 12

Regulations:

49 C.F.R. §1057.12(1)(5)

Petitioners, Refrigerated Transport Co., Inc., Farwest Furniture Transport, Inc., The Kansas-Arizona Motor Express, Inc., and Willers, Inc., d/b/a Willers Truck Service, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this proceeding July 2, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Appendix A infra.) has not yet been reported. The final order of the Interstate Commerce Commission, entitled Ex-Parte No. MC-43 (Sub-No. 7) Lease and Interchange of Vehicles is reported at, 313 M.C.C. 141 (1979), and is printed in pertinent part, in Appendix B(1) hereto, infra. The initial proposal of the Interstate Commerce Commission, entitled Ex-Parte No. MC-43 (Sub-No. 7) Lease and Interchange of Vehicles is reported at, 129 M.C.C. 700 (1978), and is in pertinent part printed in Appendix B(2) hereto, infra.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), 28 U.S.C. §1651, and 28 U.S.C. §2106.

The judgment of the Court of Appeals for the District of Columbia Circuit was entered July 2, 1980.

QUESTIONS PRESENTED

Each of the following questions presented relates exclusively to the regulation adopted by the Commission modifying 49 C.F.R. §1057. 12(1)(5):

(1) Whether the Court Below erred by validating the Interstate Commerce Commission's unfounded extension of its authority over leasing through its derivation of one implied power from another implied power?

(2) Whether Petitioners were afforded adequate notice or time to submit evidence as to the imposition of an interest rate at least equal to Treasury Bills?

(3) Whether the Commission's adoption of the specified rate of interest in the subject regulation was arbitrary, capricious and without a rational basis?

(4) Whether the Commission's willful failure to allow Petitioners to submit any evidence as to the changed rates of interest in the final regulation constituted an unconstitutional confiscation of the property of Petitioners?

STATUTES INVOLVED

This case involves 5 U.S.C. §553; 49 U.S.C. §10707(d); 49 U.S.C. §11101; 49 U.S.C. §11107.

These are reprinted in pertinent part in Appendix C.

STATEMENT

The Interstate Commerce Commission initiated proceedings in connection with Ex-Parte No. MC-43 (Sub-No. 7), Lease and Interchange of Vehicles, by issuing a notice of proposed rule-making in the Federal Register on November 23, 1977. One aspect of this proposed rule was the Commission's attempt to prescribe the amount of compensation in private owner-operator contracts. Pursuant to this proposal, Petitioners submitted extensive evidence clearly indicating that the Commission lacked statutory authority to promulage such a rule. The Commission then issued a second notice, consisting of proposed regulations, which was published in the Federal Register on July 11, 1978. The pertinent part of this proposal modifying 49 C.F.R. §1057.12(1)(5) stated:

> "That while the escrow fund is under the control of the carrier, the carrier shall pay interest on the average daily balance in the escrow fund on a quarterly basis. The level of interest shall be no less than that paid by commercial banks in the city of the carrier's legal domicile."

Following the second notice, interested parties were granted forty-five days to submit further comments. Petitioners did so, again questioning the lawfullness of the interest, per se, and additionally providing insight into the use of commercial bank rates.

Six months later, the Commission promulgated the subject regulations in Ex-Parte No. MC-43 (Sub-No. 7), Lease and Interchange of

Vehicles, 131 M.C.C. 141.

The final rule imposed a much higher rate of interest, namely, the 91 day, 13 week Treasury Bill rate, without affording Petitioners their statutory right to comment upon the significant change.

Based upon the Commission's unilateral and unconstitutional action in fixing the amount of compensation in private owner-operator contracts and in arriving at a significantly higher rate of interest that had never been discussed, Petitioners timely filed a Petition for Review of the above-stated regulation, which was denied by the Commission.

Subsequently, Petitioners sought to set aside the subject decision and regulations of the Commission in the United States Court of Appeals for the District of Columbia Circuit pursuant to and by virtue of 28 U.S.C. §§2342-2349, inclusive, 5 U.S.C. §§701-706, and 49 U.S.C. §10323. On July 2, 1980, the Circuit Court incorrectly validated the Commission's unfounded extension of its authority over leasing as well as its constitutional and statutory abuses. From this judgment, Petitioners feel compelled to file this Petition for Writ of Certiorari.

REASONS FOR GRANTING WRIT

I.

THE COURT BELOW ERRED BY VALIDATING THE INTERSTATE COMMERCE COMMISSION'S UNFOUNDED EXTENSION OF ITS AUTHORITY OVER LEASING THROUGH ITS DERIVATION OF ONE IMPLIED POWER FROM ANOTHER IMPLIED POWER.

The Court below incorrectly decided an important question of federal law which should be settled by this Court. The subject decision has set an extremely dangerous precedent in direct conflict with clear Congressional mandates by allowing an administrative agency unbounded discretion to make new law. The decision in question has a severe and far-reaching impact upon Petitioners, the motor carrier industry and the public at large in that the Commission now possesses piecemeal authority to regulate the amount of payment in other substantive areas of a contract. As such, it is a case which warrants this Court's immediate consideration and ultimate reversal of the Circuit Court's decision.

The Interstate Commerce Commission possesses substantial authority to regulate carriers engaged in interstate commerce, limited by constitutional and statutory constraints. It is now well settled that the Commission does not have unbridled discretion to adopt any rule or regulation it may fancy, but rather its regulations must be consistent with the purposes of its statutory authority. U.S. v. Resler, 313 U.S. 57 (1941); Greyhound Corp. v. U.S., 221 F. Supp. 440 (1953). Thus, an examination of the statutory authority of the Commission regarding its jurisdiction over motor carrier leasing practices is necessary to determine the guidelines within which it must operate.

A brief look at the historical background leading to the adoption of the involved regulation is important. Prior to 1953, there was no detailed statutory guidance with respect to the Commission's authority to regulate leasing practices. However, in that year, the Court

addressed this very issue in American Trucking Ass'ns. v. U.S., 344 U.S. 298 (1953), hereinafter referred to as (ATA). This Court held that the absence of specific reference to leasing practices in the Interstate Commerce Act notwithstanding, the Commission possesses the power to issue rules regulating leasing under its general rule making power. The Court further stated that the Commission could specify the manner in which a lease would show compensation, but could not specify the amount of such compensation. A thorough reading of this decision indicates that the Court placed emphasis on the absence of restricted authority or a specification of the Commission's duties. The majority opinion focused on the necessity for assuring that a vehicle leased by a motor carrier was actually under that carrier's control, that being the sole purpose of the Commission's authority over leasing.

In direct response to the (ATA) decision, Congress addressed itself to the Commission's specific authority. It did so through the enactment of the provisions now contained in 49 U.S.C. §§11101 and 11107. 49 U.S.C. §11107 clearly delineates the overall powers of the Commission with respect to the regulation of owner-operator leases. At most, the Commission's regulatory powers in this field are those of requiring that owner-operator leases be in writing, be signed by the parties thereto, specify the period during which such leases are to be in effect, specify the compensation to be paid by the motor carrier, require that a copy of the lease be carried in each motor vehicle covered by said lease, and to promulgate such other regulations as may be reasonably necessary to insure that owner-operator vehicles utilized by carriers be under the full

direction and control of such carriers and that the carriers be fully responsible for the operation of such equipment as if it were their own. Under no construction do the aforementioned powers of the Commission include a power to specify the amount of compensation one party would have to pay to another. To hold otherwise, would be in complete abrogation of a clear Congressional mandate as to the Commission's specified powers with respect to leasing practices.

Aside from the aforementioned statutes, the Commission derives additional authority from the National Transportation Policy, which specifies that it is to govern the Commission in the administration and enforcement of all provisions of the Act. In fact, this Court has enunciated that this policy will be the yardstick by which the correctness of the Commission's actions will be measured whenever it exercises either its express statutory authority or its implied general rule-making authority. Eastern-Central Motor Carriers Ass'n. v. U.S., 239 F. Supp. 591 (1965); McLean Trucking Company v. U.S., 321 U.S. 67. The new National Transportation Policy as reflected in the new Motor Carrier Act of 1980, is set forth in 49 U.S.C. §10101 and reads as follows:

> "(a) To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of trans-

> portation subject to this subtitle, and in regulating those modes..."

Nowhere in this Act can be found the authority upon which the Commission relies upon to promulgate the subject regulation. In fact, the legislative history of this Act clearly indicates the intent of Congress to curtail the powers of the Commission, not broaden them.

Consequently, neither 49 U.S.C. §11107, the stated authority under which the Commission adopted the subject regulation, nor the new National Transportation Policy grants to the Commission the authority to specify the rate of interest that must be paid by one party to another.

Clearly, the Commission's avowed interest in the protection of owner-operators is not an express power, but, rather, is an implied one. Therefore, the Commission has utilized one correlative power (protection of owner-operators) as a basis to derive yet another correlative power (the right to set the interest rate in a private contractual relationship). This is the creation of law rather than regulating pursuant to law, a position diametrically opposed to the function of an administrative agency. In Reid v. Memphis Publishing Co., 521 F. 2d 512, (1975) it was held that the power of an administrative agency in prescribing rules and regulations is not the power to make law, but, instead, it is merely the power to adopt regulations to carry out the will of Congress. Had Congress desired the Commission to regulate the amount of compensation, it would have supplied the requisite authority. It did not.

Further, the Commission's powers are even more proscribed by clear Congressional mandate on the subject of the regulation of the trip-leasing practices of carriers of perishable foodstuffs commodities such as Refrigerated Transport Co., Inc., Kansas-Arizona, and Willers. See 49 U.S.C. §11101(c)(1)(B). No such limitation is made in the Commission's leasing regulation applicable to interests in practice. As an example, Refrigerated Transport handles perishable foods which are manufactured from perishable agricultural commodities. Nevertheless, it is currently being plagued with repetitive audits of its compliance with the involved rules and the Commission does not recognize or acknowledge its limitations in this field.

In conclusion, an extremely dangerous precedent will be set should this Honorable Court accept the Circuit Court's validation of the Commission's authority to establish the amount of interest in a private leasing contract. Taken to its logical conclusion, if the Commission is allowed to prescribe the amount of interest, it could then regulate the amount of payment in other substantive areas of the contract. Hence, the Commission would have piecemeal authority to establish the total amount of compensation in a private contract, a power Congress never intended nor sought to prescribe through the adoption of the post-(ATA) amendments to the Act.

II.

PETITIONERS WERE NOT AFFORDED ADEQUATE NOTICE OR TIME TO SUBMIT EVIDENCE AS TO THE IMPOSITION OF AN INTEREST RATE AT LEAST EQUAL TO TREASURY BILLS.

Throughout almost the entire rule-making procedure, the question of interest centered upon its lawfullness, per se, and the use of commercial bank rates. Then, without notice, the Commission abruptly altered its position and promulgated a final rule imposing a much higher rate of interest, namely, the 91 day, 13 week Treasury Bill rate. This was in complete abrogation of Petitioners' statutory right to comment upon the significant change.

The Court below incorrectly accepted the government's position that Petitioners knew interest was involved and should have been prepared to comment upon this type of interest rate assessment. Implicit in this line of reasoning is that carriers should have presented an analysis of economic impact on all conceivable interest rates. However, this would place an overwhelming burden upon Petitioners, as the anticipated range of interest rates was virtually infinitesimal. This is not what the requirement of "adequate" notice represents. In this context, "adequate" notice should be governed by the notions of "fair play" and reasonableness.

In unilaterally chaning the interest rate in its final rule, it is obvious that the Commission gave no consideration to the potentially severe economic consequences upon the motor carriers. The National Transportation Policy has always required Commission consideration of the economic health of the motor carriers in all aspects of regulation. In this case, the Commission gave no opportunity for comment and evaluation on this very significant and harmful change. Had comments been permitted, the economic impact of the change could have been measured and assessed. Moreover, the high variability of 13 week Treasury Bills and the con-

comitant compliance burden upon carriers could have been brought to the Commission's attention.

Therefore, the method of adoption of the involved interest rate precluded any input from the carriers on this specified issue unless they had taken an impossible "shotgun" approach to the rule-making, anticipating every conceivable proposal made at the last minute behind closed doors by the Commission's staff.

III.

THE COMMISSION'S ADOPTION OF THE SPECIFIED RATE OF INTEREST IN THE SUBJECT REGULATION WAS UNSUPPORTED BY THE RECORD AND WAS THEREFORE ARBITRARY, CAPRICIOUS AND WITHOUT A RATIONAL BASIS.

An order of the Commission may be invalidated under the Administrative Procedure Act if it is arbitrary and capricious. Mitchell Bros. Truck Lines v. U.S., 225 F. Supp. 755 (D.C. O.R. 1963), aff'd., 378 U.S. 125 (1964). These terms mean "without a rational basis". Dell v. Summerfield, 198 F. Supp. 843 (D.D.C. 1961), aff'd., 303 F. 2d 766 (1962). To determine whether a rational nexus exists, the Courts are not required to speculate as to the basis of an administrative agency's conclusions, Northeast Airlines, Inc. v. C.A.B., (C.A.-Mass. 1964), 331 F. 2d 579, but rather it must deduce whether the involved agency decision is supported by substantial evidence on the record. Braswell Motor Freight, Inc. v. U.S., 297 F. Supp. 215 (1969). Accordingly, the grounds upon which an administrative agency acts must be clearly disclosed and adequately sustained. Schaffer Transportation Co. v. U.S., 355 U.S.

83 (1957); Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80 (1943). Consequently, an evaluation of the record is mandatory in determining whether the involved decision was predicated on a rational basis.

In the case at bar, the subject record is completely devoid of any evidence concerning what rate of interest the carriers should pay on the escrow funds. The sole reason given for the decision, was the Commission's naked and unsubstantiated statement that "several carriers commented on certain 'definitional problems' in arriving at the interest rate paid by commercial banks in the city of the carrier's legal domicile." Pursuant to this statement and this statement alone, the Commission adopted a higher interest rate because it would be uniform. However, this justification fails miserably as there is no uncertainty as to a carrier's place of domicile or the interest rates of commercial banks. In fact, interest rates of commercial banks are regularly reported in newspapers. Therefore, these "definitional problems" do not constitute a rational basis for the subject regulation, but are merely employed by the Commission as an excuse to unilaterally formulate the law.

Furthermore, both the Commission, in its final decision, and Judge Mikva, in his opinion, determined that a precedent existed for the imposition of the 91 day, 13 week Treasury Bill yield, namely, 49 U.S.C. §10707(d). However, upon closer scrutiny, this statute governs refunds to shippers of increased rail rates found by the Commission to be justified. It is both illogical and unfair for the Commission to lift the higher rate of interest for Treasury Bills out of a punitive section of the Act, and require motor carriers to pay a significant-

ly higher rate of interest on escrow funds when the Commission has found no abuses by carriers of the escrow funds that would justify imposing the Treasury Bill interest rate. The Commission's insistence upon the Treasury Bill interest rate is totally at odds with its findings, and therefore arbitrary and unreasonable.

Pursuant to 5 U.S.C. §706(2)(A), a decision on review must be considered "arbitrary and capricious" if the facts on which it is purportedly based are not supported by the record. See National Citizens Committee for Broadcasting v. F.C.C., 555 F. 2d 938 (1977). In as much as there was no record development to assess the choice made or to support the choice made, the choice itself is definitionally arbitrary. An administrative agency charged with economic regulation should be expected, at minimum, to indulge in economic analysis of a decision. The Commission has failed to engage in any economic analysis on this issue and has failed to assess the economic impact on the transportation industry--the very reason for being of the Interstate Commerce Commission. Accordingly, the rule stands arbitrary, capricious, and without rational basis because the choice made is unexplained, unaccompanied by factual analysis, and unaccompanied by record development.

IV.

THE COMMISSION'S WILLFUL FAILURE TO ALLOW PETITIONERS TO SUBMIT ANY EVIDENCE AS TO THE CHANGED RATE OF INTEREST IN THE FINAL REGULATION CONSTITUTES AN UNCONSTITUTIONAL CONFISCATION OF THE PROPERTY OF PETITIONERS.

The claim of confiscation is founded on the

"constitutional right of compensation". (ATA). The Commission willfully violated this constitutional mandate when it unilaterally adopted the subject regulations without affording interested parties the opportunity to introduce evidence relative to the amount of interest. Had it done so, it would have arrived at the inevitable conclusion that the Treasury Bill rate of interest and escrow funds are two completely different concepts that serve no useful purpose together. Escrow funds are deposited in small amounts, whereas Treasury Bills are used in denominations of $10,000. Escrow funds are drawn upon weekly for advances and other aspects of the settlement between the independent contractor and the carrier. Treasury Bill deposits may not be removed in part. Escrow funds are to be returned within 45 days of the termination of the contract which generally may be terminated at any time after the contract has been in force 30 days. 91 day Bills are redeemable only after 91 days. In view of that, the carrier is required to suffer a very substantial economic loss and the independent contractor is given a windfall gain. The contractor cannot obtain such a return on his investment on what is essentially a demand deposit with a short-term return. The carrier cannot invest the money in Treasury Bills to protect himself. It has to remain liquid, in order to pay back the escrow deposits which are returnable within 45 days on demand and effect.

In 1974, the Commission sought to award lessor/drawers 6% of certain revenues while giving the carriers the opportunity to recoup 40.09%. See Investigation of Impact of Rising Fuel Costs, 346 I.C.C. 712. The ultimate result was that the Commission's order was reversed and remanded in Refrigerated Transport Co., Inc., v. U.S.,

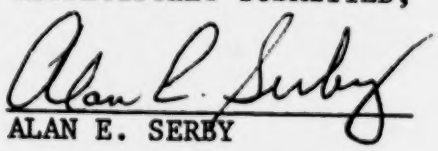
390, F. Supp. 845 (1975) on notice and findings grounds. Furthermore, the Court stated that the Commission could not take from one group and arbitrarily pass revenue onto another group. This is precisely what the Commission has done in the case at bar.

In conclusion, the Commission has severely altered a private monetary relationship. It has unjustly and unconstitutionally created a right of the owner-operator to quickly obtain a return of his performance bond as well as to obtain an interest rate out of proportion to the economic value of the bond, while subjecting the carrier to a severe economic loss.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Certiorari should be granted.

RESPECTFULLY SUBMITTED,



ALAN E. SERBY

LEE S. GOLDSTEIN
Attorneys for
Petitioners

OF COUNSEL:

SERBY & MITCHELL, PC
3390 Peachtree Road, NE
Suite 520
Atlanta, Georgia 30326
(404) 262-7855

APPENDIX "A"

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1185

GLOBAL VAN LINES, INC.,
WHEATON VAN LINES, INC., and
AMERICAN RED BALL TRANSIT COMPANY, INC.,
PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

No. 79-1264

REFRIGERATED TRANSPORT CO., INC., *et al.*, PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
NATIONAL TANK TRUCK CARRIERS, INC., INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Petitions for Review of Orders of the
Interstate Commerce Commission

Argued February 11, 1980

Decided July 2, 1980

Judgment entered this date

Stanley I. Goldman, with whom *Alan F. Wohlstetter* was on the brief, for petitioners in No. 79-1185.

Richard Tettelbaum, with whom *Alan E. Serby* was on the brief, for petitioners in No. 79-1264. *Bruce E. Mitchell* also entered an appearance for petitioners in No. 79-1264.

James P. Tuite, Deputy Associate General Counsel, Interstate Commerce Commission, with whom *Robert S. Burk*, Acting General Counsel, *Henri F. Rush*, Associate General Counsel, Interstate Commerce Commission, *John J. Powers, III*, Assistant Chief, Antitrust Division, and *Robert Lewis Thompson*, Attorney, Department of Justice, were on the brief, for respondents.

Harry C. Ames, Jr., and *Elizabeth A. Purcell* were on the brief for Intervenor, National Tank Truck Carriers, Inc. in No. 79-1264.

Nelson J. Cooney, *Kenneth E. Siegel*, *Alan J. Thiemann*, and *Robert A. Hirsch* were on the brief for Intervenor, American Trucking Associations, Inc., *et al.* in No. 79-1264.

Before: TAMM, ROBB and MIKVA, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* MIKVA.

MIKVA, *Circuit Judge*: Petitioners challenge newly promulgated Interstate Commerce Commission regulations governing leasing practices in the trucking industry. We find that the regulations are valid and affirm the Commission's order promulgating them.

I. Regulatory History

In 1973 the nation's independent (owner-operated) truckers experienced their winter of discontent. In a concerted protest, they shut down operations to protest a host of economic problems with which they were beset. The impact was sufficient to set in motion a series of congressional hearings on the plight of independent truckers.[1] The strike also motivated the Interstate Commerce Commission to commence its own hearings, staff studies, and eventually a rulemaking proceeding which resulted in the regulations here under review.[2]

Under the existing scheme of federal regulation of the trucking industry, as established by Congress in the Interstate Commerce Act ("Act"), a carrier must receive operating authority from the Commission before engaging in most forms of interstate motor transportation for hire. 49 U.S.C. § 10921. Independent truckers usually own and operate one, or perhaps a few, trucks for hire. Because of the small size of their operations, they do not seek their own interstate operating authority; rather they lease their equipment and services to a regulated

---

[1] *See Regulatory Problems of the Independent Owner-Operator in the Nation's Trucking Industry: Hearings Before the Subcomm. on Activities of Regulatory Agencies of the House Comm. on Small Business: Parts I, II, III*, 95th Cong., 2d Sess. (1976-1978). The hearings testimony is summarized in H.R. Rep. No. 1812, 95th Cong., 2d Sess. 9-23 (1978).

[2] The Commission conducted a series of hearings in various cities including Atlanta, Boston, Chicago, Fort Worth, Philadelphia, San Francisco, and Washington, D.C. A total of 438 witnesses testified and hundreds of written statements were submitted. The results of the hearings are summarized in a report entitled: *Ex Parte No. MC-113, Public Response to Proposal for Improving Motor Carrier Regulation* (December, 1977). As a result of the hearings the Commission initiated Ex Parte No. MC-43 (Sub-No. 7), *Lease and Interchange of Vehicles.*

carrier, transporting interstate under the regulated carrier's operating authority and aegis.

Truck leases, which range in duration from three months to one year,[3] usually involve a split of gross revenue equalling 25 percent for the regulated carrier and 75 percent for the independent. H.R. Rep. No. 1812, 95th Cong., 2d Sess. 5-6 (1978) (*"House Report"*). The independent generally must cover his own costs, including fuel, insurance, emergency repairs, road taxes, etc. *Id.* In addition, many lease contracts require the independent to deposit in escrow with the regulated carrier an amount ranging from about $500 to $2,000 to insure performance and to cover repair expenses, license and permit costs, and any claims that might arise out of carriage of the goods. *House Report* at 11. Escrow accounts are generally maintained for a number of months after termination of the leasing contract, a practice defended on the ground that claims are permitted to be made long after property has been transported.[4]

The various hearings uncovered a number of problems and abuses suffered by independent truckers. The owner-operators were found to be "caught in a continuing cost crunch," faced with rising costs, inflexible income, difficulties in obtaining long-term financing and questionable industry practices. *House Report* at 6-7. As a result of its own hearings, and at least partly in response to the prod from the congressional hearings,[5] the Com-

---

[3] D. WYCKOFF & D. MAISTER, THE OWNER-OPERATOR: INDEPENDENT TRUCKER 85 (1975).

[4] See, *e.g.*, 49 U.S.C. § 11707(e), providing that a carrier cannot allow less than nine months for shippers to file damage claims.

[5] The summary paragraph in the notice of institution of rulemaking proceeding, 42 Fed. Reg. 59984 (Nov. 23, 1977), states that:

[Continued]

mission commenced a rulemaking proceeding "to determine whether modified leasing rules . . . should be proposed." 42 Fed. Reg. 59984 (Nov. 23, 1977). The notice recited the previous congressional hearings, the staff studies and field hearings, and stated that "the Commission is inclined to the view that the establishment of minimum standards for leasing contracts is a desirable starting point for an overall revision of the existing leasing regulations." *Id.*

The notice invited comments on ten areas of inquiry into leasing practices.[6] After considering the first round of comments from numerous parties, the Commission proposed some specific regulations in July, 1978. *Lease and Interchange of Vehicles*, 129 M.C.C. 700 (1978), 43 Fed. Reg. 29812-18 (July 11, 1978). The proposed rules covered most of the areas set out for consideration in the notice. Pursuant to this petition for review, the Commission proposed that regulated carriers pay inter-

---

[5] [Continued]

The Interstate Commerce Commission is initiating this rulemaking proceeding on the basis of a Bureau of Operations survey of motor carrier leasing practices completed on August 23, 1977, an ongoing study of owner-operators being performed by the Bureau of Economics, and evidence gathered during recent congressional testimony and Commission field hearings on owner-operator problems.

[6] The areas listed were: 1) Compensation for Equipment and Driver; 2) Payment by Authorized Carriers to Lessors for Transportation Services Rendered; 3) Providing Copies of Rated Freight Bills at Time of Settlement; 4) Responsibility of Authorized Carriers for Fuel Costs and Other Items Associated with Transportation Services Rendered by Lessors; 5) Insurance; 6) Payment of Detention Charges and Other Accessorial Charges to Lessors by Authorized Carriers; 7) License Plate Fee Proration; 8) Escrow Funds; 9) Safety Requirements; and 10) Additional Areas for Consideration. 42 Fed. Reg. 59984-85.

est at rates comparable to those paid by commercial banks on funds held in escrow. The proposal also required the return of escrow deposits within 45 days after termination of the leasing arrangement.

There followed another round of public comments, and the Commission issued its final order in January, 1979. *Lease and Interchange of Vehicles*, 131 M.C.C. 141 (1979). With respect to the regulations governing escrow accounts, the 45-day refund rule was made final by the Commission. 131 M.C.C. at 153. Because of complaints about the uncertainty of commercial bank interest rates, the interest rule proposed in the July, 1978 report was modified to require payment at a rate "at least equal to the average yield . . . on 91 day, 13 week Treasury bills." *Id.* The final rules were scheduled to become operative on February 22, 1979, but a 30-day delay was allowed for the carriers to amend their procedures to comply with the new rules. Finally, on March 26, 1979, the new rules became effective.[7]

---

[7] The complete text of the final rule governing escrow funds is contained in 49 C.F.R. § 1057.12(1) and provides as follows:

> (l) *Escrow funds.*—If escrow funds are required, the lease shall specify:
>
> (1) The amount of any escrow fund or performance bond required to be paid by the lessor to the authorized carrier or to a third party.
>
> (2) The specific items to which the escrow fund can be applied.
>
> (3) That while the escrow fund is under the control of the authorized carrier, the authorized carrier shall provide an accounting to the lessor of any transactions involving such fund. The carrier shall perform this accounting in one of the following ways:
>
> (i) By clearly indicating in individual settlement sheets the amount and description of any deduction or addition made to the escrow fund; or

[Continued]

The history of the generation of the subject regulations illustrates how gradually the wheels of change turn in the regulated trucking field. Not until six years after the impetus of the independent trucker strike and protest did the Commission effect final changes in the regulations. Many of the final regulations were noncontroversial.[8] Others generated some disagreement but were

---

[7] [Continued]

(ii) By providing a separate accounting to the lessor of any transactions involving the escrow fund. The separate accounting shall be done on a monthly basis.

(4) The right of the lessor to demand to have an accounting for transactions involving the escrow fund at any time.

(5) That while the escrow fund is under the control of the carrier, the carrier shall pay interest on the escrow fund on at least a quarterly basis. For purposes of calculating the balance of the escrow fund on which interest must be paid, the carrier may deduct a sum equal to the average advance made to the individual lessor during the period of time for which interest is paid. The interest rate shall be established on the date the interest period begins and shall be at least equal to the average yield or equivalent coupon issue yield on 91-day, 13-week Treasury bills as established in the weekly auction by the Department of Treasury.

(6) The conditions the lessor must fulfill in order to have the escrow fund returned. At the time of the return of the escrow fund, the authorized carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in the lease, and shall provide a final accounting to the lessor or all such final deductions made to the escrow fund. The lease shall further specify that in no event shall the escrow fund be returned later than 45 days from the date of termination.

[8] Those regulations dealing with disclosure of the terms of the lease agreement were generally well received by all parties. *E.g.*, Rule 1, requiring specification of compensation, and Rule 7, requiring specification of the costs to be borne by each party, received virtually no negative comments. 131 M.C.C. at 144, 148.

not challenged on appeal.[9] However, petitioners assert that the regulations governing escrow accounts exceed the statutory authority granted the Commission under the Act and that they further are arbitrary and capricious. Despite the contentions of petitioners, we hold that the changes instituted by the Commission were rationally supported and well within the statutory authority of the Commission.

II. Authority of the Commission

The seminal case on the Commission's authority to regulate leasing activities is *American Trucking Associations v. United States*, 344 U.S. 298 (1953). Prior to Commission action in that case, carriers had generally used single-trip leasing, with compensation measured as a percentage of gross revenue derived from the single trip. The Commission abolished this practice, ordering that leases be of at least 30 days' duration and that compensation be calculated on other than a gross revenue basis. These rules were challenged on the ground that the Act did not contain any express delegation of power to regulate leasing practices, and that such power could not be implied from the separate provisions of the Act granting regulatory authority. Conceding the absence of express authority in the Act, the Supreme Court nevertheless rejected this attack, stating that "Our function . . . does not stop with a section-by-section search for the phrase 'regulation of leasing practices' among the literal words of the statutory provision." *Id.* at 309. The Court

---

[9] The Commission made efforts to accommodate concerns expressed in response to the proposed rules. *E.g.*, as proposed, Rule 2 required payment to the lessor within 10 days after submission of necessary delivery documents. The final rule was modified to extend the payment period until 15 days after submission of the documents in response to comments that the 10-day period was too burdensome. 131 M.C.C. at 146.

took the position that "the promulgation of these rules for authorized carriers falls within the Commission's power, despite the absence of specific reference to leasing practices in the Act." *Id.* at 312. In reaching this holding, the Court looked to the Commission's general regulatory authority, concluding that since the aim of the rules was to promote "the maintenance of sound transportation services" and to prevent conditions which may "frustrate the success of the regulation undertaken by Congress," the Commission's action was within its rulemaking power, which is "coterminous with the scope of agency regulation itself." *Id.* at 310, 311.

In 1956, shortly after the decision in *American Trucking*, Congress amended the Act to address specifically the subject of trip leasing. One part of the amendment clarified congressional intent that carriers of agricultural products, which are otherwise exempt from the operation of the Act, should also be exempt from regulations governing leasing arrangements. 49 U.S.C. § 11101(c).[10] The other part of the amendment enacted into law certain of the regulations upheld in *American Trucking*. 49 U.S.C. § 11107.[11] The Commission was specifically authorized to require written leases governing transport of non-exempt products, and to promulgate regulations necessary to assure full direction and control of leasing operations by the regulated carriers. *Id.* Petitioners interpret this amendment as delimiting the authority of the Commission with respect to regulation of leasing. They argue that this is all the Commission is authorized

---

[10] The Act was revised and recodified without substantive change, and enacted as 49 U.S.C. § 10101 *et seq.* on October 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337. 49 U.S.C. § 11101(c) was former section 204(f) of the Act, formerly codified at 49 U.S.C. § 304(f).

[11] Former section 204(e) of the Act, formerly codified at 49 U.S.C. § 304(e).

to do, and that the present regulations, dealing with particular aspects of escrow accounts, overstep the boundaries of Commission authority.

Petitioners' restrictive interpretation of the 1956 amendment is incompatible with the overall structure of the Act, the legislative history surrounding the amendment, and the holding in *American Trucking*. The section of the Act dealing with the general powers of the Commission, 49 U.S.C. § 10321(a), provides that "Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle." This is entirely consistent with the holding of *American Trucking* that the Commission can regulate even in the absence of express statutory authority, so long as the regulations are reasonably designed to carry out the overall purposes of the Act. Absent an express statutory limitation, the Commission's authority is not restricted to only the powers enumerated in § 11107.

Furthermore, there is nothing in the legislative history of the 1956 amendment to indicate that Congress intended to restrict the plenary power of the Commission recognized in *American Trucking*. Indeed, just the opposite intent is revealed. One of the objections raised to the amendment in the Senate Hearings was that "it would take from the Interstate Commerce Commission the power to regulate trip leasing." *Trip Leasing, Report of the Comm. on Interstate and Foreign Commerce*, S. Rep. No. 1271, 84th Cong., 1st Sess. 5 (1955) ("*Senate Report*"). The objection was responded to by noting that the restrictions on Commission power were only as to exempt carriers, whose concerns Congress was attempting to allay in passing the amendments. The view was expressed that this would "leave the Commission free to regulate the carriage of goods on the public highways, a duty imposed upon it by law." *Id.*

With respect to the part of the amendment that codified the regulations approved in *American Trucking*, the *Senate Report* states, "While it is true that the courts have held that some of this authority already rests with the Commission, still it is believed advisable to make them law by enactment rather than by court decision." *Id.* at 6. This language in no way indicates any congressional intent to limit the general regulatory powers of the Commission. Rather it was Congress' purpose in enacting the amendment "that the authority of the Interstate Commerce Commission to properly regulate motor carriers be maintained." *Id.* Thus, so long as the regulations can be justified as reasonably related to the purposes of the Act, they cannot be objected to as being outside the Commission's jurisdiction. *See Mourning v. Family Publications Service*, 411 U.S. 356, 369 (1973); *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968).

The regulations here under attack were promulgated in response to serious financial problems affecting the nation's independent truckers. It is estimated that there are over 100,000 independent truckers generating from $4 to $6 billion in gross revenues each year. D. WYCKOFF AND D. MAISTER, THE OWNER-OPERATOR: INDEPENDENT TRUCKER 12 (1975). These truckers constitute a substantial portion of the trucking industry, accounting for up to 40 percent of all intercity truck freight movements in the United States. *House Report* at 5. The difficulties undermining the economic viability of independent truckers thus create a threat to the health and stability of the trucking industry as a whole. Like the rules approved in *American Trucking*, the purpose of the present regulations "is to protect the industry from practices detrimental to the maintenance of sound transportation services consistent with the regulatory system." *American Trucking*, 344 U.S. at 310. As such, they are within

the scope of the Commission's authority and, if rationally supported, must be upheld. *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972).

III. The 45-Day Refund Rule

The prevalent practice in truck leasing has been to require independent truckers to deposit a specified sum in escrow with the regulated carrier. The various investigations by Congress and the Commission flagged these accounts as a major source of problems for the independents. Delays in obtaining refund of the escrow deposits create serious cash-flow problems for the independent who wants to enter a new arrangement but has substantial sums tied up in escrow funds still pending from prior agreements. Sometimes, complained the independents, the deposit was not given back at all. 129 M.C.C. at 726; *House Report* at 11.

In the first notice of proposed regulation, the Commission suggested a 30-day limit on return of escrow deposits. 42 Fed. Reg. at 59985. Following comments, the time was extended in the interim rule to 45 days, 129 M.C.C. at 742, 43 Fed. Reg. at 29817, and after another round of comments the 45-day rule was adopted by the Commission as final. 131 M.C.C. at 153. Some of the carriers complained in their comments to the Commission that the 45-day time limit was too short since, in some cases, shippers have up to nine months after transport to make claims for damages. 131 M.C.C. at 154. However, the testimony before the Commission on this issue was scant.[12] There was no evidence presented

[12] Petitioner Global Van Lines stated in its comment:

> We submit that the last requirement, *viz.*, that escrow funds be returned within 30 days of a lease should not be made applicable to household good carriers. In the household goods operation, the escrow fund must be retained for at least 180 days to allow settlement of all

as to the frequency of claims filed beyond the 45-day period, and many of the carriers commenting expressed their agreement with the period chosen by the Commission.[13]

The Commission was faced with the job of balancing the possible harm to regulated carriers by a foreshortened refund schedule against the harm suffered by independent truckers from extended delays in getting refunds. It is well established, however, that the Commission "must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." *Permian Basin*, 390 U.S. at 767. It is not the role of this court to second-guess the Commission and impose our own resolution of such conflicts. Our role is limited to determining

---

claims that might be attributed to a particular owner-operator. The extra time should be allowed because many shippers do not file claims within 30 days after delivery.

Joint Appendix (J.A.) at 67.

There were no details supplied as to the experience of the company with respect to the filing of such claims. Although several other carriers submitted similar statements, for the most part they simply referred to the statutory provision that claims may be filed for up to 9 months as the sole reason for disagreeing with the shorter time period proposed by the Commission. *See, e.g.*, comments of: Stevens Van Lines, J.A. at 36; Aero Mayflower Transit Co., J.A. at 51-52; The American Movers Conference, J.A. at 69; Movers' & Warehousemen's Ass'n of America, J.A. at 71; Movers Round Table, J.A. at 73-74; and Bekins Van Lines Co., J.A. at 78.

[13] Carriers expressing agreement with either a 30-day or 45-day time limit include: Bayview Trucking, Inc., J.A. at 34; Bray Lines Inc., J.A. at 38-39; Mid Seven Transportation Co., J.A. at 41; Aero Liquid Transit, Inc., J.A. at 45; Willis Shaw Frozen Express, Inc., J.A. at 55; Crete Carrier Corp. & Shaffer Trucking, Inc., J.A. at 60; and The Maxwell Co., J.A. at 62.

whether the Commission's decision is within the "zone of reasonableness." *Id.*; *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942). The 45-day rule here under review is clearly within that zone. The Commission could have chosen to balance the scales more heavily on the side of the independents or the regulated carriers, but the decision as to where that balance should be struck is the very essence of administrative discretion with which this court may not meddle.

IV. The Interest Rule

In addition to holding escrow monies for extended periods of time, many of the regulated carriers did not pay interest on the money while it was in escrow.[14] The Commission found this practice to be inequitable and determined that interest should be paid on amounts held.[15] With this decision, petitioners do not seriously disagree. However, they do disagree on the particular rate of interest which the Commission set.

In its interim decision, the Commission proposed the rate be "no less than that paid by commercial banks

---

[14] A Commission staff study revealed that 23 percent of the owner-operators surveyed received interest on their escrow accounts. 129 M.C.C. at 727.

[15] As proposed in the interim decision, the regulations required interest to be paid on "the average daily balance in the escrow fund on a quarterly basis." 129 M.C.C. at 725, 43 Fed. Reg. at 29817. Several carriers objected to this proposal on the ground that escrow funds "are not used exclusively to better the carrier's cashflow situation, but are extensively used by carriers to provide lessors with cash advances before each trip." 131 M.C.C. at 153. To accommodate this situation, the Commission modified the regulations in its final decision to provide that "[f]or purposes of calculating the balance of the escrow fund on which interest must be paid, the carrier may deduct a sum equal to the average advance made to the individual lessor during the period of time for which interest is paid." 131 M.C.C. at 153.

in the city of the carrier's legal domicile." 129 M.C.C. at 742, 43 Fed. Reg. at 29817. Some of the comments received on the proposal indicated there might be some difficulty deciding what that rate is, given the various rates banks pay for different types of accounts, and the possible difficulty in determining the "legal domicile" of a large interstate trucking company. In its final rule, the Commission resolved these problems by setting the interest rate equal to that of 91-day Treasury bills.

Petitioners contend that it was unfair of the Commission to respond to complaints about indefiniteness by imposing a higher rate than that originally proposed for comment.[16] The Commission, on the other hand, justifies its decision on grounds that the Treasury bill rate is both unambiguous and uniform throughout the country, thus decreasing the likelihood of disputes over what the proper rate should be. The Commission notes, too, that because the Treasury bill rate was specifically authorized by statute in the context of railroad refunds, 49 U.S.C. § 10707(d), there is some precedent for its use.

Petitioners respond that the railroad statute referenced by the Commission sets the interest on railroad overcharges, and thus should be interpreted as a punitive rate or "penalty." However, they are unable to cite any authority for this proposition, or any legislative history to that effect. The Treasury bill rate is, after all, the rate at which the government must borrow money. We cannot say that in setting this rate for escrow funds the Commission was being unreasonable or penalty-minded.

---

[16] We note that the Treasury bill rate is not intrinsically higher than commercial bank rates. Although under present economic conditions the Treasury bill rate is in fact somewhat higher, this has not always been the case historically and the situation may change again in the future.

Again, setting the interest rate involves a balancing of concerns. Even if the result is to charge the regulated carriers a slightly higher rate than they deem fair, the Commission can justifiably balance this harm against the benefit of having an easily determinable, uniform rate which will prevent unnecessary disputes in the future. As stated in *National Tank Truck Carriers, Inc.* v. *ICC*, 559 F.2d 845, 849 n.7 (D.C. Cir. 1977), "Even if the ICC's regulations were to disadvantage a particular segment of the trucking industry more than others . . . that fact alone would not change their generalized nature or affect their validity." It is not for this court to upset the scales simply because petitioners disagree with their tilt.

V. Conclusion

As discussed, the regulations challenged here are within the scope of the Commission's authority, and are reasonably related to the purposes of the Act. The Commission responded to a clearly stated concern of a segment of the industry, a concern strongly seconded by Congress. The course it chose to follow was well within the limits set by statute. While the regulations reallocate the burdens as between the regulated carriers and the independents, we do not believe that as a whole the final allocation was unfair. In any event, this was for the Commission to measure. We therefore affirm the Commission's order promulgating the regulations.

Affirmed.

Appendix "B(1)"

Final Rule.-Section 1057.12(1)

(5) That while the escrow fund is under the control of the carrier, the carrier shall pay interest on the escrow fund on at least a quarterly basis. For purposes of calculating the balance of the escrow fund on which interest must be paid, the carrier may deduct a sum equal to the average advance made to the individual lessor during the period of time for which interest is paid. The interest rate shall be established on the date the interest period begins and shall be at least equal to the average yield or equivalent coupon issue yield on 91-day, 13-week Treasury bills as established in the weekly auction by the Department of Treasury.

Appendix "B(2)"

Proposed Rule: Section 1057.12(1)

Escrow funds. If escrow funds are required, the lease shall specify:

5) That while the escrow fund is under control of the carrier, the carrier shall pay interest on the average daily balance in the escrow fund on a quarterly basis. The level of interest shall be no less than that paid by commercial banks in the city of the carrier's legal domicile.

49 U.S.C. § 11107

§ 11107. Leased motor vehicles

Except as provided in section 11101(c) of this title, the Interstate Commerce Commission may require a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title that uses motor vehicles not owned by it to transport property under an arrangement with another party to—

(1) make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier;

(2) carry a copy of the arrangement in each motor vehicle to which it applies during the period the arrangement is in effect;

(3) inspect the motor vehicles and obtain liability and cargo insurance on them; and

(4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary of Transportation on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier.

49 U.S.C. § 11101

§ 11101. Providing transportation and service

(a) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide the transportation or service on reasonable request. In addition, a motor common carrier shall provide safe and adequate service, equipment, and facilities.

(b) The Commission may prescribe requirements for continuous and adequate transportation and service provided by motor common carriers and freight forwarders subject to the jurisdiction of the Commission under subchapters II and IV of chapter 105 of this title and for transportation of baggage and express by such motor common carriers of passengers.

(c) The Commission may not regulate the duration of, or the amount of compensation payable under, an arrangement between a motor carrier and another party to use, with a driver, a motor vehicle not owned by that carrier to transport property when—

(1) the motor vehicle—

(A) to be used is that of a farmer or a cooperative association or a federation of cooperative associations under section 10526(a) (4) or (5) of this title or a motor private carrier;

(B) is used regularly in the transportation of (i) property referred to in section 10526(a)(6) of this title, or (ii) perishable products manufactured from perishable property referred to in that section; and

(C) is to be used by the carrier in a single movement or in one or more of a series of movements, loaded or empty, in the general direction of the general area where the motor vehicle is based; or

(2) the motor vehicle to be used has completed a movement exempt under section 10526(a)(6) of this title and is next to be used by that carrier in a loaded movement in any direction or in a movement referred to in clause (1)(C) of this subsection, or both.

(d) If the Commission does not suspend a proposed rate increase that is the subject of a proceeding under this section, the Commission shall require the rail carriers involved to account for all amounts received under the increase until the Commission completes the proceeding or until 7 months after the increase becomes effective, whichever occurs first, or, if the proceeding is extended under subsection (b) of this section, until the Commission completes the proceeding or until 10 months after the increase becomes effective, whichever occurs first. The accounting must specify by whom and for whom the amounts are paid. When the Commission takes final action, it shall require the carrier to refund to the person for whom the amounts were paid that part of the increased rate found to be unjustified, plus interest at a rate equal to the average yield (on the date the proposed increase is filed) of marketable securities of the United States Government having a duration of 90 days. When any part of a proposed rate decrease is suspended and later found to comply with this subtitle, the rail carrier may refund any part of the portion of the decrease found to comply with this subtitle if the carrier makes the refund available equally to the shippers who participate in the rate according to the relative amounts of traffic shipped at that rate.

5 U.S.C. § 553

SEC. 553. RULE MAKING

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity

for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of September, 1980, pursuant to Rule 33(3)(b) of this Court, I served true and accurate copies of the foregoing Petition for Writ of Certiorari upon counsel for all parties of record, postage prepaid as follows:

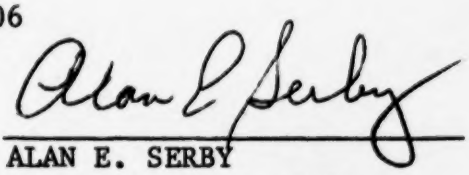
Benjamin R. Civiletti
Solicitor General
Department of Justice
Washington, D.C. 20530

Harry C. Ames
Ames, Hill & Ames
805 McLachlan Bank Bldg.
Washington, D.C. 20001

Richard A. Allen
General Counsel
Interstate Commerce Commission
Room 5139
Washington, D.C. 20423

Robert A. Hirsch
American Trucking Assoc.
1616 P Street, N.W.
Washington, D.C. 20036

Alan F. Wohlstetter
Stanley I. Goldman
Denning & Wohlstetter
1700 K Street, N.W.
Washington, D.C. 20006



ALAN E. SERBY
Attorney for Petitioners

OF COUNSEL:

SERBY & MITCHELL, PC
3390 Peachtree Rd, NE
Suite 520
Atlanta, Georgia 30326
(404) 262-7855

Supreme Court, U. S.
FILED
DEC 16 1980
MICHAEL RODAK, JR., CLERK

No. 80-618

In the Supreme Court of the United States

OCTOBER TERM, 1980

REFRIGERATED TRANSPORT CO., INC., ET AL.,
PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

RICHARD A. ALLEN
General Counsel

HENRI F. RUSH
Associate General Counsel

CHARLES A. STARK
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-618

REFRIGERATED TRANSPORT CO., INC., ET AL.,
PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

QUESTIONS PRESENTED

1. Whether regulations promulgated by the Interstate Commerce Commission regarding interest to be paid on "escrow" funds held by regulated motor carriers exceeded the Commission's statutory authority.

2. Whether the Commission's selection of an appropriate interest rate was arbitrary and capricious.

3. Whether petitioners were given adequate notice and opportunity to be heard concerning the interest-on-escrow regulation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

American Frozen Food Institute v. *Train*, 539 F.2d 107	10
American Iron and Steel Institute v. *EPA*, 568 F.2d 284	10
American Trucking Ass'ns v. *United States*, 344 U.S. 298	3, 5, 7, 8
Lease and Interchange of Vehicles (Interim Decision), 129 M.C.C. 700	3, 4, 7
Lease and Interchange of Vehicles (Final Decision), 131 M.C.C. 141	4, 5
Mourning v. *Family Publications Service, Inc.*, 411 U.S. 356	7
United States v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742	8, 9
United States v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33	10

Statutes and regulations:

Interstate Commerce Act, as recodified and reenacted, Pub. L. No. 95-473, 92 Stat. 1337, 49 U.S.C. (Supp. II) 10101 *et seq.*	2
49 U.S.C. (Supp. II) 10101	1, 7
49 U.S.C. (Supp. II) 10101(a)(2)	8
49 U.S.C. (Supp. II) 10101(a)(3)	8

PREVIOUS PAGE WAS BLANK

Statutes and regulations—Continued: Page

49 U.S.C. (Supp. II) 10101(b) 8
49 U.S.C. (Supp. II) 10321(a) 2, 7
49 U.S.C. (Supp. II) 10707(d) 7, 9
49 U.S.C. (Supp. II) 10921 2
49 U.S.C. (Supp. II) 11101 7
49 U.S.C. (Supp. II) 11101(c) 7
49 U.S.C. (Supp. II) 11107 7
Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 8
49 C.F.R. 1057.12(*l*) 4
49 C.F.R. 1100.97(d) 10

Miscellaneous:

42 Fed. Reg. 59984-59985 (1977) 3
H.R. Rep. No. 95-1812, 95th Cong., 2d Sess. (1978) 2, 3
S. Rep. No. 1271, 84th Cong., 1st Sess. (1955) 8

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 627 F.2d 546. The interim decision of the Interstate Commerce Commission is reported at 129 M.C.C. 700 (1978). The Commission's final decision is reported at 131 M.C.C. 141 (1979).

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1980. The petition for a writ of certiorari was filed on September 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The "national transportation policy," 49 U.S.C. (Supp. II) 10101, provides in pertinent part:

> (a) To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, * * * it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—
>
> * * * * *
>
> (2) to promote safe, adequate, economical, and efficient transportation;
>
> (3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;
>
> * * * * *
>
> (6) to encourage fair wages and working conditions in the transportation industry.
>
> (b) This subtitle shall be administered and enforced to carry out the policy of this section.

49 U.S.C. (Supp. II) 10321(a) provides:

> The Interstate Commerce Commission shall carry out this subtitle. Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle. The Commission may prescribe regulations in carrying out this subtitle.

STATEMENT

Under the Interstate Commerce Act, 49 U.S.C. (Supp. II) 10101 *et seq.*,[1] a carrier must receive a license from the Interstate Commerce Commission before engaging in most forms of interstate motor transportation for hire. 49 U.S.C. (Supp. II) 10921. Many truckers who own and operate one or two trucks for hire, however, do not seek their own interstate operating authority because of the small size of their operations; they lease their equipment and services to a regulated carrier, transporting cargo in interstate commerce under the regulated carrier's operating authority and aegis (see Pet. App. A3–A4).

In 1973 the Nation's independent (owner-operated) truckers shut down operations to protest a host of economic problems with which they were beset. The strike precipitated hearings by both Congress and the Commission on the plight of the independent truckers (Pet. App. A3–A4). The hearings disclosed that independent truckers had trouble earning a profit under their leases. They were found to be "caught in a continuing cost crunch," faced with rising costs and inflexible income. H.R. Rep. No. 95–1812, 95th Cong., 2d Sess. 5–7 (1978). In addition, many truck leases required the independent trucker to deposit funds in es-

[1] Citations to the Interstate Commerce Act will be to subtitle IV of Title 49, United States Code, as recodified and reenacted by Congress in 1978. Pub. L. No. 95–473, 92 Stat. 1337.

crow with the regulated carrier, usually $500 or $1,000, to ensure performance and to cover repair expenses, license and permit costs, and claims that might arise out of the carriage of the goods. H.R. Rep. No. 95-1812, *supra*, at 11. These funds were often held for several months (Pet. App. A4). Only 23% of the regulated carriers who included escrow provisions in their leases paid interest on the escrowed funds. *Lease and Interchange of Vehicles*, 129 M.C.C. 700, 727 (1978) (*Interim Decision*).

As a result of the various hearings, the Commission commenced a rulemaking proceeding to consider modifying its leasing rules (Pet. App. A5). The notice of proposed rulemaking stated that one issue to be considered was the payment of interest on escrow funds. 42 Fed. Reg. 59984-59985 (1977). A number of regulated carriers, including petitioners, submitted comments arguing that the Commission lacked the statutory authority to promulgate the regulations. *Interim Decision*, *supra*, 129 M.C.C. at 702.

The Commission promulgated an interim decision proposing specific regulations to alleviate the independent truckers' problems. The Commission proposed, *inter alia*, that regulated carriers pay interest on the funds held in escrow at rates comparable to those paid by commercial banks operating in the regulated carrier's domicile. It also proposed that escrow deposits be returned within 45 days after termination of the leasing arrangement. *Interim Decision*, *supra*, 129 M.C.C. at 725-727. Addressing the comments that challenged its authority, the Commission, relying on *American Trucking Ass'ns, Inc.* v. *United States*, 344 U.S. 298 (1953), found that the proposed regulations were within its broad powers to regulate matters reasonably necessary to accomplish the purposes of the Interstate Commerce Act. It reasoned that the regulations would promote a smoothly functioning transpor-

tation system by reducing the possibility of disruptions in transportation services that could result if independent truckers suffered cash flow problems because of the existing escrow fund practices. *Interim Decision*, *supra*, 129 M.C.C. at 702–707.

After announcing its proposed rules, the Commission invited further public comments. In January 1979, the agency issued its final decision, essentially adopting its interim rules with minor modifications. *Lease and Interchange of Vehicles*, 131 M.C.C. 141 (1979) (*Final Decision*). The Commission made two modifications to the interim interest-on-escrow regulation.[2] First, it established that interest payments on the es-

[2]The Commission's final rule governing escrow funds provides in pertinent part (49 C.F.R. 1057.12(*l*)):

> (*l*) Escrow funds.—If escrow funds are required, the lease shall specify:
>
> * * * * *
>
> (5) That while the escrow fund is under the control of the carrier, the carrier shall pay interest on the escrow fund on at least a quarterly basis. For purposes of calculating the balance of the escrow fund on which interest must be paid, the carrier may deduct a sum equal to the average advance made to the individual lessor during the period of time for which interest is paid. The interest rate shall be established on the date the interest period begins and shall be at least equal to the average yield or equivalent coupon issue yield on 91-day, 13-week Treasury bills as established in the weekly auction by the Department of Treasury.
>
> (6) The conditions the lessor must fulfill in order to have the escrow fund returned. At the time of the return of the escrow fund, the authorized carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in the lease, and shall provide a final accounting to the lessor or [sic] all such final deductions made to the escrow fund. The lease shall further specify that in no event shall the escrow fund be returned later than 45 days from the date of termination.

crow funds be made at a rate "at least equal to the average yield * * * on 91-day, 13-week Treasury bills" so as to eliminate the " 'definitional' problems" of determining commercial bank interest rates and a regulated carrier's place of domicile. Second, the Commission exempted from the interest-on-escrow rule those monies that regulated carriers use to make interest-free cash advances to independent operators. *Final Decision*, *supra*, 131 M.C.C. at 153–154.

Petitioners did not petition the Commission to reconsider or modify its final interest-on-escrow rule. The rules became effective in March 1979, and petitioners sought judicial review challenging the lawfulness of the interest-on-escrow provision primarily on the theory that the Commission lacked statutory authority and a rational basis for promulgating that regulation.[3]

The court of appeals upheld the interest-on-escrow rule (Pet. App. A1–A16). The court found that the interest-on-escrow provision was designed to foster the economic viability of the independent trucker, whose financial problems threaten the health and stability of the trucking industry as a whole. Because the regulation was intended to maintain a sound transportation system, the court concluded that it was designed to achieve the purposes of the Act and that the Commission possessed the authority to promulgate it under *American Trucking Ass'ns* v. *United States*, *supra* (Pet. App. A10–A11). The court also found that

---

[3] In a separate appeal (*Global Van Lines* v. *ICC and United States*, No. 79–1185 (D.C. Cir.)), several other regulated carriers petitioned the court of appeals to set aside the Commission's rule that regulated carriers must return all escrow funds within 45 days after the lease terminates. That case was consolidated with the instant case. The court of appeals upheld the 45-day refund rule (Pet. App. A12–A14). No petition for certiorari has been filed in the *Global Van Lines* case.

the Commission's rule was rational, noting that petitioners did not seriously disagree with the need for the interest requirement although they did object to the particular rate selected (*id.* at A14). Finally, the court upheld the Commission's use of the Treasury bill rate as a reasonable exercise of the agency's discretion, balancing the benefit of having an easily determinable uniform rate of interest against the burden on the regulated carriers of paying that rate (*id.* at A16).

ARGUMENT

1. Petitioners contend (Pet. 4–9) that the Commission exceeded its statutory authority in promulgating the interest-on-escrow rule. This contention is without merit. The court of appeals correctly held that the Commission acted within its authority under *American Trucking Ass'ns* v. *United States*, *supra*.

In *American Trucking*, this Court rejected a challenge to the Commission's authority to promulgate regulations concerning the duration of leases between regulated carriers and independent truckers. The Court noted the absence of express authority in the Act to regulate leasing practices but found that Congress' grant of general rulemaking authority under Section 204(a)(6) of the Act (now recodified at 49 U.S.C. (Supp. II) 10321(a)) authorized the leasing regulations. Because the challenged rules were designed to promote the "maintenance of sound transportation services" and thus to prevent conditions that could "frustrate the success of the regulation undertaken by Congress," the Commission's action necessarily fell within its rulemaking power. 344 U.S. at 310–311.

Similarly, as the court of appeals noted (Pet. App. A11), the Commission's regulations in this case are aimed at maintenance of sound transportation services. The rules prohibit the unremunerated use of in-

dependent truckers' funds as one of a number of measures aimed at halting the deterioration of the independents' finances. The Commission reasonably concluded that a threat to the independent truckers' economic viability creates a threat to the trucking industry as a whole and therefore that the regulations further the national transportation policy of maintaining a smoothly functioning transportation system. *Interim Decision*, *supra*, 129 M.C.C. at 706–707. See 49 U.S.C. (Supp. II) 10101. The Nation's independent truckers account for up to 40% of all intercity truck freight movement in the United States (Pet. App. A11). Clearly, regulations intended to preserve the independents' financial stability are designed to further the overall purpose of the Act, and their issuance is within the Commission's rulemaking authority. *American Trucking Ass'ns* v. *United States*, *supra*; *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973).

Petitioners suggest (Pet. 6–9) that the Commission's regulatory authority over truck leasing was limited by Congress in 1956, after this Court's decision in *American Trucking*, by the enactment of 49 U.S.C. (Supp. II) 11101 and 11107 (see Pet. App. C35–C36).[4] Section 11101(c), however, merely clarified Congress' intent that carriers of agricultural products that are otherwise exempted from the operation of the Act are also exempted from the regulations governing leasing. This section has no application here because petitioners are regulated carriers.

Section 11107 enacted several of the Commission's regulations that were upheld in *American Trucking*, including the requirement that leases be in writing.

---

[4]The subsection reproduced under (d) at Pet. App. C36 is not, as it appears there, part of 49 U.S.C. (Supp. II) 11101; it is 49 U.S.C. (Supp. II) 10707(d).

Nothing in Section 11107 suggests that the Commission's authority over leasing is limited by that section. Indeed, that narrow construction is completely inconsistent with 49 U.S.C. (Supp. II) 10321(a), which provides: "Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle." Moreover, as the court of appeals found (Pet. App. A10–A11), the legislative history of the 1956 amendments plainly indicates that Congress had no intent to limit the Commission's authority under *American Trucking*. On the contrary, it was intended that that authority not be disturbed. See S. Rep. No. 1271, 84th Cong., 1st Sess. 5–6 (1955).[5]

2. Petitioners also contend (Pet. 11–13) that the Commission's selection of the Treasury bill rate is arbitrary and capricious and not supported by substantial evidence. The "substantial evidence" test has no application here. The appropriate standard of review was outlined by this Court in *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972):

> We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported.

---

[5] Petitioners also suggest (Pet. 7–8) that since the passage of the Motor Carrier Act of 1980, Pub. L. No. 96–296, 94 Stat. 793 (July 1, 1980), the national transportation policy no longer authorizes the Commission to promulgate the proposed rules. This contention is without foundation. The Motor Carrier Act of 1980 leaves intact the directive that the Commission should administer and enforce the Act to carry out the national transportation policy. 49 U.S.C. (Supp. II) 10101(b). Among the goals set forth

The Commission clearly set forth a rational basis for adopting the Treasury bill rate. In its interim decision the Commission proposed that the interest rate be no less than that paid by commercial banks in the city of the carrier's legal domicile (Pet. App. A15). But several parties objected to that formula because there might be some difficulty deciding what that rate is, given the various rates commercial banks charge and the difficulty of determining a carrier's legal domicile (*ibid.*). In its final decision, the Commission selected the Treasury bill rate to overcome these objections. The Commission also noted the statutory precedent for using the Treasury bill rate in the context of railroad refunds, 49 U.S.C. (Supp. II) 10707(d).[6]

The court of appeals aptly observed that the Commission's decision represents a balance between the benefit of having a uniform, easily determinable rate that will prevent unnecessary disputes in the future and the burden on petitioners of a slightly higher rate (Pet. App. A16). The court correctly applied the standard of review set out in *Allegheny-Ludlum* in refusing "to upset the scales simply because petitioners disagree with their tilt" (*ibid.*).[7]

---

in this national transportation policy that the Motor Carrier Act of 1980 retains are "to promote safe, adequate, economical, and efficient transportation" and "to encourage sound economic conditions in transportation." 49 U.S.C. (Supp. II) 10101(a)(2), (3). Petitioners do not contend that the Motor Carrier Act of 1980 eliminates the general rulemaking authority of the Commission.

[6] These refunds are from monies collected under proposed rate increases that are not immediately suspended by the Commission but are ultimately rejected. Clearly, petitioners err in characterizing Section 10707(d) as a "punitive section of the Act" (Pet. 12).

[7] Moreover, the court of appeals correctly observed (Pet. App. A15) that the Treasury bill rate is not intrinsically higher than commercial bank rates. Furthermore, petitioners may avoid any interest obligations by not requiring escrow funds as part of their lease agreements with owner-operators.

3. Petitioners also contend (Pet. 9–11, 13–15) that they were not afforded adequate notice and opportunity to comment on the final interest rate rule and that the Commission's failure to allow them to offer evidence in opposition to the final rule amounts to an unconstitutional taking of their property. These contentions are without merit.

From the very outset of this rulemaking proceeding, petitioners were on notice that the Commission was considering whether to require the payment of interest on escrow accounts. The Commission never suggested that it would restrict its consideration to a particular formula for fixing the interest rate. Even after the Commission's interim decision proposed fixing the interest rate at commercial bank rates, petitioners were on notice that the Commission might not adopt this as its final rule. Petitioners thus were afforded ample opportunity throughout this proceeding to suggest and comment upon various methods of fixing the interest rate. The rule ultimately adopted by the Commission, which was designed to remedy problems pointed out in the comments of the parties with respect to the interim rule (including the addition of a provision allowing an offset for advances), clearly falls within the purpose and scope of the rulemaking as delineated in the notices. Its adoption did not prejudice petitioners in any way.[8] Finally, to require another

---

[8] As petitioners note (Pet. 4), they sought review before the Commission of the interest-on-escrow rule, but only of the *interim* rule. They did not request the Commission to reconsider its final rules, which specified the Treasury bill rate. See 49 C.F.R. 1100.97(d). This Court has recognized that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). Petitioners should not now

round of comments simply because changes were made in the interim rules, as petitioners suggest (Pet. 10), would result in an administrative process that would never end. See, *e.g.*, *American Iron and Steel Institute* v. *EPA*, 568 F.2d 284, 293 (3d Cir. 1977); *American Frozen Food Institute* v. *Train*, 539 F.2d 107, 134–135 (D.C. Cir. 1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

RICHARD A. ALLEN
General Counsel

HENRI F. RUSH
Associate General Counsel

CHARLES A. STARK
Attorney
Interstate Commerce Commission

DECEMBER 1980

---

be permitted to object to the modification of the interim rules when they failed to take advantage of the procedure for making such an objection before the Commission.

☆U.S. GOVERNMENT PRINTING OFFICE: 1980 334481 194

No. 80-618

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

REFRIGERATED TRANSPORT CO., INC., ET AL.,
PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

ALAN E. SERBY
LEE S. GOLDSTEIN
Counsel for
Petitioners

OF COUNSEL:

SERBY & MITCHELL, P.C.
Fifth Floor-Lenox Tower South
3390 Peachtree Road, N.E.
Atlanta, Georgia 30326

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-618

REFRIGERATED TRANSPORT CO., INC., ET AL,
PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERCIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

Petitioners wish to briefly address one point raised in the Brief for the United States and the Interstate Commerce Commission In Opposition. The government intimates in footnote 8 that Petitioners' failure to seek agency review on the final interest-on-escrow rule precludes the assertion that they were not afforded adequate notice and opportunity to comment upon the interest rate ultimately adopted.

Initially, it is interesting to note that this argument was never raised in the Court below. As such, Petitioners assert that the government is now estopped from presenting this argument to this Court.

Secondly, Petitioners aver that the government's contention is without merit. It is uncontroverted that Petitioners presented extensive evidence regarding the interest rate contained in the initial and interim rules on every occasion they were permitted to do so. It is true that a Petition for Reveiw was not filed once the Commission unilaterally promulgated the final rule imposing a completely new and much higher rate of interest. However, the reason is quite simple. The language of the rule itself, as well as the Commission's own rules, do not afford Petitioners the right to seek agency review. The involved rule itself states that it is final and will become effective 30 days after publication in the FEDERAL REGISTER. This constituted an administratively final order.

To support its assertion, the government relies upon 49 CFR 1100.97. However, this section, by its own terms, procludes any administrative review of the involved rule. Therefore, the subject case was ripe for judicial review.

Finally, the government contradicts it own position on this point (Reply Brief 11) contending that the requirement of an additional round of comments on the final rule, as pertinent to the interest rate in question, would unduly burden the administrative process. The government's position on the administrative finality of the rule is legally unfounded, which is undoubtedly why it is raised only in a footnote. What the government is attempting to sidestep, is the fact that the Commission unlawfully refused to consider the adverse impact such a rule would have upon the trucking industry as a whole. This interest clearly outweighs any delay incurred in waiting an additional period of time in order to secure

evidence regarding the new interest rate.

CONCLUSION

For the foregoing reasons, as well as those which have been urged in the Petition, Certiorari should be granted.

RESPECTFULLY SUBMITTED,

ALAN E. SERBY

LEE S. GOLDSTEIN

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of December, 1980, pursuant to Rule 33(3)(b) of this Court, I served true and accurate copies of the foregoing Reply Brief for Petitioners upon counsel for all parties of record, postage prepaid as follows:

Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D.C. 20530

Richard A. Allen
General Counsel
Interstate Commerce Commission
Room 5139
Washington, D.C. 20423

/s/
ALAN E. SERBY
Attorney for Petitioners

OF COUNSEL:

SERBY & MITCHELL, P.C.
Fifth Floor-Lenox Towers South
3390 Peachtree Road, N.E.
Atlanta, Georgia 30326